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No. 03-0393

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

PUBLIC SERVICE MUTUAL
INSURANCE COMPANY,

Petitioner,

v.

ELLEN M. PECK,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

BRIEF IN OPPOSITION FOR RESPONDENT ELLEN M. PECK

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Second Circuit correctly reversed an order of summary judgment entered against the respondent by the District Court on the basis that there remained unresolved issues of material fact in dispute between the parties concerning whether the petitioner-insurer had been materially prejudiced as a result of allegedly receiving late notice of the respondent's claim in an earlier lawsuit filed in 1994.

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BRIEF IN OPPOSITION FOR RESPONDENT ELLEN M. PECK

Respondent Ellen M. Peck ("Peck") submits that the petition for writ of certiorari filed by Petitioner Public Service Mutual Insurance Company ("PSM") should be denied. The decision below, by the Second Circuit Court of Appeals, correctly reversed the order of summary judgment entered against Peck by the District Court after determining that there remained critical issues of material fact still in dispute concerning when notice of a claim was received by PSM and whether PSM was prejudiced as a result of not receiving notice earlier. Issues of notice and prejudice are fact driven, and should be decided by a jury after hearing all of the evidence. Contrary to the assertions made by the petitioner in the petition now before this Court, Peck did in fact produce specific evidence in opposition to summary judgment, and the Second Circuit Court of Appeals was correct in deciding that she had made a sufficient showing to defeat summary judgment.

The petitioner raises no novel issue of law, and there is no reason for this Court to hear further argument concerning a motion for summary judgment. This case was properly remanded to the District Court for further consideration. The respondent should be provided with her day in court, so that a jury can finally decide all of the issues still in dispute between these parties.

STATEMENT OF THE CASE

This case arises out of a civil lawsuit initially filed by Peck in the Connecticut Superior Court in 1994 as a result of excessive noise coming from the Rattlesnake Bar &

Grill, which moved directly beneath Peck's condominium unit in South Norwalk, Connecticut in 1992 and began to feature live rock music several nights each week. Peck brought suit against the owner of the condominium unit, South Norwalk Redevelopment Limited Partnership ("SNRLP"), as well as Rattlesnake Ventures, Inc. ("Rattlesnake") and its owner, William Opper.

The summons and complaint were filed on or about June 23, 1994, alleging an ongoing course of improper conduct by the defendants, beginning in 1992 and continuing into the future. Five days after the complaint was filed, the law firm of Goldstein & Peck entered an appearance on behalf of all three defendants. Subsequently, on December 6, 1994, Attorney Paul McCullough also appeared solely on behalf of SNRLP.

When Peck first filed suit in 1994, the defendants only provided notice of her claim to the Greater New York Insurance Company and to the Travelers Insurance Company, the two carriers who insured the premises from 1992-1994. However, because the complaint alleged ongoing tortuous conduct by the defendants, it was later necessary to provide additional notice to PSM, whose policy covered the period 12/1/94-12/1/95. On September 8, 1995 Goldstein & Peck, counsel of record for all defendants, requested that insurance agent Ronald Fitelson notify PSM of the underlying action. Four days later, on September 12, 1995, Fitelson faxed to PSM a Loss Notice and the summons and complaint, which separately listed each defendant, and contained individual counts directed against each defendant, so that they were readily distinguishable.

When providing notice of the claim to PSM, Fitelson instructed PSM to contact Attorney Eugene Cederbaum, the lawyer then handling the case at Goldstein & Peck. On September 14, Daniel Jaconetti, the head of litigation at PSM, set up a claim file in which he made handwritten notes about the claims alleged in Peck's complaint. (App. 22a) Jaconetti clearly recognized that separate claims were being asserted by Peck against SNRLP, which was listed as an additional insured on the policy, writing "Possibly may be coverage for Counts Nine and Ten [against SNRLP] Depending upon lease Agr. And if Co-defendant [SNRLP] is Add'l Insd. On Policy."

Mr. Jaconetti immediately directed insurance adjuster Barry Blecher to get a hard copy of the policy and the lease agreement between Rattlesnake and SNRLP. (App. 22a) Mr. Blecher in turn contacted Attorney Cederbaum, who on October 20 confirmed for Blecher that "the premises on which the restaurant is located is rented from South Norwalk." Attorney Cederbaum further advised PSM that Peck's deposition was scheduled to take place on October 26th. (Pet. App. at 30a)

In early November, PSM received a copy of the lease agreement, which specifically required Rattlesnake to maintain liability insurance for SNRLP, and to name SNRLP as an additional insured. PSM clearly recognized that claims were being asserted by Peck against SNRLP and that there might be coverage for the claims asserted against SNRLP in Counts 9 and 10 of her complaint, as evidenced by the initial file notes made by Mr. Jaconetti on September 14, 1995. However, PSM refused to participate in the underlying litigation, and refused to provide any of the defendants with a legal defense.

Although invited to attend Peck's deposition on October 26th, PSM refused to hire defense counsel or even to contribute to the defense costs presently being borne by the Greater New York Insurance Company and the Travelers Insurance Company, who had hired the firm of Gildea & Stevens to appear for the defendants on January 23, 1995. On November 28, 1995 PSM sent a letter to Rattlesnake denying insurance coverage on the grounds that (1) the date of the loss was when the noise first started in October, 1992, prior to the December 1, 1994 effective date of the policy; (2) notice of the claim was not timely provided by Rattlesnake until September 12, 1995; and (3) intentional acts alleged in parts of the complaint were excluded from coverage.

Although PSM had received notice of the claim from the Fitelson Insurance Agency, who procured the coverage on behalf of all defendants, including SNRLP as an additional insured listed on the declarations page of the policy, PSM never sent any disclaimer of coverage to SNRLP, and SNRLP was not referred to in the letter sent to Rattlesnake. (Pet. App. at 30a)

Peck had no way to independently contact PSM in order to discuss the claim, as none of the defendants identified PSM as an insurer in response to discovery requests. Finally, on November 25, 1996, Peck filed a motion for default against SNRLP for failure to answer discovery requests. Although an order of default was entered against SNRLP on July 21, 1997, this was *not* a default judgment. Under Connecticut Rules of Practice an order of default is distinguishable from a default judgment. Peck did not move for judgment against SNRLP until the conclusion of trial in 1998, and the order of default could have easily

been remedied at any time prior to trial by providing the requested discovery.

On May 29, 1998 Attorney Brian Gildea, formerly of the firm Gildea & Stevens, entered a new appearance in the case on behalf of all defendants. At a pretrial conference held in July, 1998 Attorney McCullough advised the court that he would not be attending the trial on behalf of SNRLP, because his participation would be prohibitively expensive for his client, who was supposed to be insured and defended by Rattlesnake in accordance with the terms of the lease agreement. (Pet. App. at 31a) Attorney Gildea explained to the court that he planned on defending only Rattlesnake and Opper, because those were the only insureds listed on the policy issued by the Greater New York Insurance Company, who was paying him to be there. Although the lease agreement required Rattlesnake to make sure that SNRLP was also insured under that policy, the tenant had failed to do so.

At that point in the proceedings the Superior Court judge ordered Attorney McCullough to notify any insurance carrier who did insure SNRLP of the approaching trial date. The judge specifically stated that if the insurer wanted "to come in and ask for a continuance," the court would consider such a request. (Pet. App. at 31a) As the tenant had purchased the insurance policy and paid the premiums, Attorney McCullough did not know who to call in response to the judge's order. Therefore Attorney Gildea interceded, and offered to contact PSM.

From the courthouse Attorney Gildea called PSM, notifying PSM that the trial was scheduled to commence shortly, and that SNRLP's personal counsel had been given permission not to attend. Although Attorney Gildea

specifically informed PSM of the judge's order to notify the carrier, PSM responded by stating that it "had closed [its] file on this matter, and had no intention of hiring defense counsel or taking any other steps to get involved in the litigation." (App. 17a)

Although the trial judge had invited PSM to get involved in the case, and had indicated on the record a willingness to consider a request for continuing the trial date so that additional defense counsel could appear and get up to speed, PSM decided not to take any action in order to protect SNRLP.

After a jury trial on the merits of the underlying case, judgment was entered against SNRLP in the amount of $250,000 on August 4, 1998. (Pet. App. at 32a) In September, 1998 Attorney Cederbaum again contacted PSM, notifying PSM of the verdict and inviting the insurer to participate in post-trial efforts to settle the case or appeal. PSM responded by demanding a copy of the entire trial transcript, without offering to pay for same. (Id.) On April 4, 1999 the undersigned sent Mr. Blecher a letter, asking PSM to pay the judgment entered against SNRLP. PSM refused to respond.

In May, 1999 Peck sued PSM in Connecticut District Court, pursuant to Connecticut's direct action statute, C.G.S. § 38a-321. (Pet. App. at 33a) In June, 2001, six months after the expiration date for filing dispositive motions in the case, PSM filed a motion for summary judgment against Peck, arguing that SNRLP's failure to provide timely notice of the underlying claim defeated insurance coverage and precluded Peck's cause of action. Peck filed a sixteen page memorandum in opposition to summary judgment on July 16, 2001 (App. 1a-16a), which

included a sworn affidavit from Attorney Gildea concerning his efforts to notify PSM of the claims asserted against SNRLP prior to trial. (App. 17a) On July 26, 2001 Peck filed a supplemental memorandum in opposition to summary judgment which also included copies of PSM's file materials and excerpts from Mr. Jaconetti's deposition which confirmed that PSM knew about the claims being asserted against SNRLP in 1995, before Peck was deposed, before SNRLP was defaulted, and three full years before trial, but opted to close its file without providing defense or indemnification for *any* of the defendants on the basis that the complaint alleged facts outside of the scope of coverage. (App. 19a-30a)

Peck argued that PSM had waived any right to claim late notice by failing to issue a disclaimer of coverage to SNRLP. Peck also argued that PSM was not materially prejudiced by not receiving notice of the underlying claim until September 12, 1995 because there was still ample time to hire defense counsel and defend the case prior to trial. Finally, Peck argued that PSM's letter to Rattlesnake, wherein PSM denied coverage in any event because the claims asserted in the complaint fell outside the scope of coverage, proved that PSM did not change its position in any way because of SNRLP's failure to provide earlier notice of the claim; no matter when notice was provided, PSM was not going to agree to defend or indemnify any of the insureds. As there was no change in its position, PSM could not argue that it had been materially prejudiced by late notice.

In a November 11, 2001 unpublished decision and order, the District Court granted summary judgment for PSM solely on the late notice defense, finding that PSM had "been deprived of its right to defend" the underlying

lawsuit because it did not learn of the claims being made against SNRLP until after receiving the demand for payment from the undersigned on April 4, 1999. The District Court failed to comment on Peck's argument that PSM had waived its right to raise a late notice defense as a matter of law by failing to ever send a disclaimer letter to SNRLP prior to raising this defense in 2001, six years after first receiving notice of the claim in 1995 and more than two years after receiving a demand for payment of the judgment. (Pet. App. at 34a)

Peck filed a timely appeal with the Second Circuit Court of Appeals. On April 17, 2003 the Second Circuit reversed the District Court, and remanded the case for further proceedings in accordance with its opinion that the respondent had established that there remained genuine issues of material fact still in dispute concerning the issues of notice and alleged prejudice to PSM. Although Peck bore the burden of establishing that PSM was not materially prejudiced, the Court concluded that she had put forth enough evidence to show that PSM was not prejudiced so as to defeat summary judgment.

On or about May 7, 2003 PSM filed a petition for a rehearing and a petition for the matter to be heard en banc. (Pet. App. at 68a-77a) The panel of Judges who initially decided the appeal filed an errata sheet modifying a portion of their original decision on May 21, 2003, specifically acknowledging that Peck bore the burden of proof on the issue of material prejudice, but holding that "Peck has done so here." Thereafter, on June 13, 2003, PSM's petition for a rehearing and petition for a rehearing en banc were both denied by the Second Circuit. The order issued by the Second Circuit confirmed that PSM's petition for rehearing en banc had been transmitted to the judges

of the Court in regular active service and any other judge that heard the appeal and that no such judge had requested that a vote be taken thereon.

On July 2, 2003 the judgment of the District Court was officially vacated, and the case was remanded for further proceedings in accordance with the decision issued by the Second Circuit. The final decision issued by the Second Circuit Court of Appeals was reported as *Peck v. Public Service Mutual Ins. Co.*, 326 F.3d 330 (2d Cir. 2003). The petition for certiorari was filed on or about September 16, 2003.

REASONS FOR DENYING THE WRIT

I. This Case Involves the Application of Well-Established Law and its Application to a Motion for Summary Judgment and Does not Merit a Grant of Certiorari

This petition was filed after the Second Circuit Court of Appeals remanded the case to the District Court for further proceedings in order to further litigate factual issues pertaining to when PSM first received notice of the underlying action and whether PSM was materially prejudiced. The Second Circuit decision does not raise any new issue of law, and there is no split in authority among the circuits or the state courts of last resort in terms of the applicable law concerning the standards for summary judgment, nor is there a conflict with Supreme Court precedent.

Despite the petitioner's arguments to the contrary, the respondent did in fact submit sufficient evidence in opposition to summary judgment to properly defeat said motion.

The respondent submitted documentation from PSM's own claims file which established that PSM received notice of the claims filed against SNRLP in September, 1995, prior to SNRLP being defaulted, and three full years prior to trial. These documents made it clear that PSM recognized that separate claims were being asserted against SNRLP, and that there could be insurance coverage for those claims. Any subsequent prejudice to PSM came about because of its own refusal to hire defense counsel as obligated by the terms of the insurance contract, and not because of any inaction or neglect by SNRLP. The policy required PSM to defend, not SNRLP.

The respondent also submitted an affidavit from Attorney Brian Gildea, acting defense counsel in the underlying action at the time of trial, who states under oath that he personally called PSM prior to the commencement of jury selection in order to notify PSM of the approaching trial and the need to hire additional defense counsel for SNRLP, which was named as an additional insured on the PSM insurance policy. This call was made in direct response to an order of the trial court, which was offering to continue the trial if PSM and/or new defense counsel needed more time. PSM again opted to ignore the claim, telling Mr. Gildea that it "had closed [its] file on this matter, and had no intention of hiring defense counsel or taking any other steps to get involved in the litigation." (App. 17a)

Any prejudice claimed by PSM was self-inflicted by its own refusal to properly respond to claims it knew to exist against an additional insured for three years before trial. Once more, even if PSM had received notice of the suit the very day it was filed, we can be certain that the insurer would not have acted any differently. PSM has consistently maintained that the insurance policy does not

provide coverage for the claims made by Peck. PSM refused to share in the costs of defending the other insureds, Rattlesnake and Opper, and refused to participate in post-trial settlement negotiations. The fact of the matter is that Peck's claims really are covered by the policy, but PSM is afraid to litigate that issue, and instead seeks to avoid that issue altogether by arguing a preemptive late notice defense.

The Connecticut Supreme Court has held that the issue of whether there is material prejudice to an insurer because of late notice should be determined on a *factual* basis by the jury, as opposed to a question of law decided solely by the court. *Aetna Casualty & Sur. Co. v. Murphy*, 206 Conn. 409, at 419-20, 538 A.2d 219 (1988). Similarly, whether PSM waived its ability to claim prejudice by its own actions and its own failure to ever issue a disclaimer letter to SNRLP is a question of material fact that should be decided by a jury after hearing all of the evidence. *Jenkins v. Indemnity Ins. Co.*, 152 Conn. 249, 259, 205 A.2d 780 (1964); *Kurzatkowski v. Kurzatkowski*, 142 Conn. 680, 684, 116 A.2d 906 (1955).

The decision below is consistent with Connecticut insurance law, and the Second Circuit properly remanded this case to the District Court so that these issues of material fact, which remain hotly contested by the parties, can be properly decided after being fully developed and explored at trial. The decision is consistent with this Court's holding in *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986), as the Second Circuit properly concluded that the respondent had met her burden of coming forward with specific facts showing that there was a genuine issue for trial concerning her contention that PSM was not materially prejudiced as a result of late notice. Peck produced

documentation from PSM's claims file, deposition testimony from PSM's claims supervisor, and an affidavit from defense counsel Gildea in support of her position, and this was more than sufficient evidence to defeat a motion for summary judgment on this issue.

The petition for certiorari should be denied. Issues concerning when notice was received and whether PSM was materially prejudiced are issues of fact, which should be decided at trial, and not by any appellate court. The respondent has a right to present her case at trial. The respondent was initially awarded $250,000 by a jury in 1998. She has waited six years for her day in court to prove that this award is covered by the terms of the petitioner's insurance policy. This case was properly remanded to the District Court, and should immediately proceed to trial. There is no reason for this Honorable Court to grant certiorari.

II. The Petitioner has Failed to Cite any Legal Authority in Support of its Contention that the Second Circuit Court of Appeals Abused its Discretion in Modifying its Original Decision

The petitioner cites no legal authority whatsoever for its claim that the Second Circuit Court of Appeals abused its discretion in using an errata sheet to modify its original decision. The modification was made on May 21, 2003, well before PSM's petition for rehearing en banc was denied on June 13. If any judge wanted to hear additional argument or to further examine the holding reached by the initial panel a vote would have been requested. No such request was made.

Given the petitioner's failure to cite any legal authority in support of its contention that the Court below abused its discretion, this Honorable Court should deny the petition for certiorari on this question as well.

CONCLUSION

For all of the reasons stated and discussed herein, the petition for writ of certiorari should be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ELLEN M. PECK Plaintiff VS PUBLIC SERVICE MUTUAL INSURANCE COMPANY Defendant	CIVIL 3:99-CV-886(GLG) JULY 16, 2001

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. STATEMENT OF FACTS:

The court has ruled on numerous prior motions in this case which have set forth the facts giving rise to this lawsuit, and these will not be reiterated yet again by the plaintiff. However, it is important to underscore that the judgment obtained in the underlying case in 1998 was based upon the allegations set forth in the operative amended complaint dated June 1, 1998. While the defendant's brief addresses only the allegations set forth in two earlier complaints, it can not be disputed that the judgment at issue entered on a complaint filed in 1998. It is the operative complaint filed in 1998 which will determine whether there is insurance coverage for the judgment.

In addition, it should be noted that the defendant's motion for summary judgment has been filed well after the agreed upon cut-off date for the filing of dispositive motions, which was January 31, 2001 per the parties' report of second planning meeting filed on or about July 24, 2000. The plaintiff has had to incur costs in order to locate an expert witness for disclosure by September 1, 2001. The defendant should not be permitted to wait until this late

date to file a potentially dispositive motion. The motion is more than six (6) months past the agreed upon deadline, and it should not even be entertained by the court at this juncture.

II. LAW AND ARGUMENT:

The defendant's motion for summary judgment is based upon four different arguments. Each of these arguments will be addressed in turn.

(i) Time Span of Damages

First, the defendant argues that there is no insurance coverage for this claim because the complaint filed in the underlying action did not allege any damages to have occurred during the policy period, which began on December 1, 1994 and continued forward through December, 1998. A basic review of any of the three complaints filed in the underlying action reveal this argument to be completely without merit.

The original complaint, dated June 23, 1994, alleged a continuing course of conduct. While it is true that the complaint alleges that the noise problems *began* in October, 1992, it is equally true that the complaint also alleged an *ongoing*, regular course of conduct by the defendants. The defendants continued to cause damages from 1992 right up until the time of trial in 1998.

Each count of the complaint directed against South Norwalk Redevelopment Limited Partnership alleged in relevant part as follows:

> **"As a direct result of said improper use South Norwalk Redevelopment has caused**

Ms. Peck to suffer the following injuries in an ongoing, regular basis since October, 1992: . . ."

(a copy of the original complaint is attached as exhibit 3 to the defendant's memorandum)

The defendant focuses myopically on the 1992 *commencement* of the noise problem, completely ignoring the allegations of "*ongoing*, regular" misconduct which immediately precede the commencement date.

The word "ongoing" is an adjective, defined in The International Webster's Comprehensive Dictionary of the English Language (1999 Ed.) as "Going on, continuing or progressing." Thus it can not be disputed that the complaint alleged a *continuing* course of misconduct, as opposed to a single act that occurred on one specific date.

While the conduct began in 1992, it continued, unabated, for years thereafter. The Rules of Practice did not require the plaintiff to file a series of amended complaints every week up until the time of trial in 1998 in order to offer evidence about conduct that occurred throughout 1995-1998; her original complaint alleged an *ongoing* problem, and entitled her to offer evidence of a *pattern of misconduct* by the defendants which took place in the years that followed the initiation of the lawsuit.

The complaint is not ambiguous. It alleged an ongoing course of conduct that took place during the time policy period. Nowhere in the complaint does it say that the noise ended, nor does it allege damages "up until the present time" of the initial filing date. A plain reading of the complaint and the claims for damages indicates that the

plaintiff was suing for an ongoing course of conduct. The wording of the complaint looks forward, not back.

Even if the court should find any ambiguity as to the time when damages were alleged to have occurred, the ambiguity must be read in favor of coverage not against coverage as argued by the defendant. *See, e.g., Stephan v. Pennsylvania Mutual Assurance Co.*, 224 Conn. 758, 763 (1993); *Streitweiser v. Middlesex Mutual Assurance Co.*, 219 Conn. 371, 375 (1991); *Schultz v. Hartford Fire Insurance Co.*, 213 Conn. 696, 712 (1990); *Missionaries of the Company of Mary, Inc. v. Aetna Casualty & Surety Co.*, 155 Conn. 104, 108 (1967).

As the defendant presents its arguments in a summary judgment motion, it is also important to recognize that the issue of when the damages took place is a question of material fact, which should be left to the jury to decide. The jury can examine the operative complaint, and decide whether the complaint alleges any facts that trigger insurance coverage. Summary judgment is inappropriate to decide disputed issues of material fact, and again all inferences and ambiguities must be read in favor of the non-moving party. *Gallo v. Prudential Residential Partnership*, 22 F.3d 1219 (2d Cir. 1994). *See also* FRCP 56(c), which provides that summary judgment is only appropriate if there is no genuine issue of material fact in dispute.

In the case at bar the defendant asks the court to limit its review to the initial complaint filed by the plaintiff in 1994. The defendant also asks the court to ignore the amended complaint filed in 1998. No legal authority is provided in support of this skewed analysis. It can not be disputed that the 1998 complaint was the operative complaint at the time of trial, and superseded the earlier

complaint. Practice Book § 10-60. In addition, the amended complaint was submitted as an exhibit in the underlying trial, and the record clearly demonstrates that the jury's verdict was based solely upon that amended complaint.[1]

The defendant submits no legal authority in support of its argument that the original complaint should control in determining the scope of insurance coverage. Although there may be a question in dispute as to whether the defendant received notice of the amended complaint, that is another question of material fact that needs to be resolved by the jury.

The plaintiff has obtained an affidavit from trial counsel in the underlying case, Attorney Brian Gildea, attesting to the fact that he contacted Public Service Mutual prior to trial, specifically to inform the defendant that a default had entered against SNRLP, and that additional defense counsel should appear.[2] Thus, there was still time for the defendant to get involved in the underlying case prior to trial, and to find out about the existence of an amended complaint. The evidence indicates that the defendant knew or should have known about the amended complaint, but decided to ignore the entire matter in the hope that it would never be pursued.

In total, three complaints were filed in the underlying action prior to trial. All three of the complaints alleged a continuing course of conduct that caused damages from

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[1] A copy of the amended complaint submitted to the jury is attached as "Exhibit 1."

[2] A copy of the affidavit is attached as "Exhibit 2."

1992 up until the time of trial in 1998. In cases involving multiple occurrences causing damages over several years, the "multiple injury trigger" test must be applied in order to determine whether there is insurance coverage. *United Technologies Corp. v. American Home Insurance,* 989 F. Supp. 128, 153 (D. Conn. 1997). If any of the damages occurred during the policy period, insurance coverage is triggered; even if the initial damages started prior to when the policy went into effect. *Id.*

The plaintiff has determined that the defendant collected approximately $90,000.00 in insurance premiums for the insurance coverage it provided to Rattlesnake Ventures, Inc. and SNRLP throughout 1994-1998. Additional premiums were collected because SNRLP was added [sic] an additional insured. Although the plaintiff produced enormous amounts of evidence throughout the underlying case which proved that her damages occurred throughout 1995, 1996, 1997 and 1998, the insurance company now argues that there is no coverage because all of the damages occurred prior to when its policy first went into effect in December, 1994. The defendant's argument ignores the facts, and lacks the support of any legal authority. The argument should be rejected by this court, especially when presented in the context of a motion for summary judgment.

(ii) Lack of Notice

The defendant also argues that it is entitled to summary judgment because SNRLP never provided notice of the underlying action. This arguments [sic] must fail to [sic] for three different reasons. First, the defendant is legally estopped from raising the notice issue because (a) it

refused to defend the underlying lawsuit even after becoming aware of its existence prior to trial; and (b) it has never disclaimed coverage for lack of notice, and can not raise this issue for the first time at trial. Second, a complete copy of the summons and complaint was admittedly received by the defendant from SNRLP's insurance agent in 1995. Although the agent only mentioned the named insured (Rattlesnake) on the claim submission form, the summons and complaint clearly listed SNRLP as a separate defendant, thus providing actual notice that claims were being made against SNRLP as well as Rattlesnake.

Finally, Attorney Brian Gildea had appeared for *all* defendants in the underlying case, and he has provided an affidavit that he again notified the defendant about this case prior to trial. Thus, a lawyer formerly representing SNRLP is on record as having provided additional notice to the defendant *prior to* jury selection and prior to trial.

Although three years has elapsed since the verdict was obtained in the underlying case, the defendant has never disclaimed coverage for this claim by sending a letter denying coverage to its insured, SNRLP. The law is well established; an insurance company can not remain silent for years, and then disclaim coverage after the verdict. *National Union Fire Ins. Co. v. Mastroni*, 754 F. Supp. 269, 272 (D. Conn. 1990).

The defendant claims that it did not realize that its policy also covered SNRLP when the [sic] it first received the summons and complaint from the agent in 1995. The defendant should be responsible for knowing who it insures. SNRLP was named as an additional defendant on *every* policy, and listed *separately* on the declarations pages. In addition, the defendant collected additional

premiums for the extra coverage afforded to SNRLP. If the defendant failed to recognize that the policy also covered SNRLP, the fault lies with the defendant, not with Ellen Peck.

Attorney Gildea provided additional notice to the defendant prior to trial. At that time the defendant ignored the notice, indicating to Mr. Gildea that the file was closed. Again, the defendant failed to notify SNRLP prior to trial that coverage was being denied. SNRLP chose not to pay its own attorney, Paul McCullough, to participate in the trial because (1) it felt that legal defense should be provided by the insurance company, and (2) assumed that any award would be covered by insurance. Had the defendant advised SNRLP of its position prior to trial, SNRLP may have taken a different position.

The parties agree that the only notice of disclaimer sent by Public Service Mutual was that provided to Rattlesnake Ventures, Inc. No notice has ever been sent to SNRLP. A notice of disclaimer to one party to insurance contract does not operate as a disclaimer to any other party who has not received proper notice from the insurer. *Hartford Accident & Indemn. Co. v. J.J. Wicks, Inc.*, 104 A D.2d 289, 294, 482 N.Y.S.2d 935, 939 (4th Dep't 1984); *John v. Centennial Ins. Co.* 91 A.D.2d 1104, 1105, 458 N.Y.S.2d 350, 352-53 (3d Dep't), *appeal denied*, 59 N.Y. 2d 605, 451 N.E.2d 505, 464 N.Y.S.2d 1026 (1983). A refusal to take *any* action after receiving notice of the claim constitutes a legal waiver of a later claim for defective notice. *Travelers Ins. Co. v. Central Nat'l Ins. Co. of Omaha*, 733 F. Supp. 522 531 (D. Conn. 1990).

Even if notice of a claim is late, the insurer still has a duty to defend the case under a reservation of rights. A

failure to take any action waives the right to later raise the notice issue. *Black v. Goodwin, Loomis & Britton, Inc.*, 239 Conn. 144, 155-157 (1996); *Keithan v. Massachusetts Bonding & Ins. Co.*, 159 Conn. 128, 139 (1970); *Missionaries of the Company of Mary, Inc. v. Aetna Casualty & Surety Co.*, 155 Conn. 104, 113 (1967). *See also, Lee v. Aetna Casualty & Surety Co.*, 178 F.2d 750, 751 (2d Cir. 1968); *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524, 532 (Iowa, 1995).

As the defendant has failed to ever notify its insured that notice was defective, it can not now raise this issue as a defense to coverage at the time of trial. The defendant has waived the right to raise a policy defense of lack of notice, and should be estopped from making this argument.

Even if the defendant is permitted to raise a lack of notice defense, this would not be dispositive of this case. The plaintiff would still be permitted to offer evidence to show that the defendant was not prejudiced by the alleged lack of notice.[3] *Aetna Casualty & Surety Co. v. Murphy*, 206 Conn. 409, 412-19 (1988). The defendant may also defeat lack of notice by showing justifiable excuse on the part of SNRLP. *Monteiro v. American Home Assurance Co.*, 177 Conn. 281, 233 (1979). Thus, the defendant is not entitled to summary judgment on this issue.

---

[3] The defendant refused to provide coverage or a legal defense to Rattlesnake Ventures, Inc., and would have denied coverage and legal defense to SNRLP, no matter when notice was provided. The reality is that the defendant would not have changed its position, and was not prejudiced in any way because of the alleged lack of notice from SNRLP.

It is anticipated that the plaintiff will produce Attorney Paul McCullough at trial, and that he will explain to the jury that he repeatedly asked the lawyers hired to defend Rattlesnake (hired by Travelers and the Insurance Company of Greater New York) to assume the defense of SNRLP as well, as required by the lease agreement. Unfortunately, the tenant had not obtained additional coverage for SNRLP for all of the years of the lease agreement, as originally agreed. SNRLP was only added as an additional insured on one of the insurance policies, the one issued by Public Service Mutual. As Public Service Mutual refused to defend Rattlesnake, there was no way it would agree to defend SNRLP.

Attorney McCullough will testify that he did not have access to the insurance policies purchased by Rattlesnake, and did not know who to call directly. Not having this information, he directed his demands for a legal defense and insurance coverage to Rattlesnake Ventures, Inc. and the lawyers defending Rattlesnake at the request of the various insurers. If this information was not properly passed on to the defendant, the jury may conclude that SNRLP had a justifiable excuse for not providing notice directly to the carrier.

It is further expected that testimony will be presented at trial from Attorneys Eugene Cederbaum, Louis Annechino, and Andrew Turret who were hired by Travelers Insurance Company to defend Rattlesnake. Although they attempted to communicate with Public Service Mutual, the defendant consistently refused to respond, indicating that it had simply closed its file and did not want to be bothered. Even if the defendant had received notice of this claim, it would have done nothing differently. There was no prejudice to the defendant.

(iii) Voluntary Default

The defendant complains that SNRLP voluntarily allowed a default to enter against it, and refused to incur the substantial costs of paying for its own lawyer to defend the case throughout trial. However, this argument ignores the fact that Public Service Mutual was the one who had the obligation to provide a legal defense under the terms of the policy. Even after receiving a telephone call from Attorney Gildes, asking for separate trial counsel for SNRLP, the defendant refused to act. Having breached the insurance contract, the defendant can not now blame its insured for failing to provide a proper legal defense.

In *Black v. Goodwin, Loomis & Britton, Inc.*, 239 Conn. 144 (1996) the defendant not only refused to defend the lawsuit brought by the plaintiff, but actually entered into a stipulated judgment in the amount of $500,000. In addition, the defendant provided the plaintiff with an assignment of rights to pursue the judgment directly against the insurance company. In exchange, the plaintiff agreed not to look to the defendant, individually, to satisfy the award. The insurance company cried foul, arguing that the insured unfairly cooperated with the plaintiff by agreeing to a large judgment. The Connecticut Supreme Court held that this was entirely proper, given the circumstances.

The court held that when an insurer has refused to defend its insured, it is in no position to argue that the steps the insured took to protect itself should inure to the insurer's benefit. 239 Conn. 144, 154, 156. Moreover, once an insuror has refused to defend, it can not thereafter dispute the insured's liability to the injured person. Instead, the insurer must pay the judgment. *Id.* at 160.

In the case at bar the insured defendant did not stipulate to an inflated judgment. The attorney for the insured simply refused to participate further in the trial because no one would pay his fees. Repeated requests made to the insurance company lawyers hired to represent the co-defendant (to assume the defense of SNRLP as well) were ignored. At that point SNRLP had no obligation to look out for the interests of the insurance company. Public Service Mutual knew about the situation, by [sic] chose not to get involved. The jury later awarded damages against SNRLP. Public Service Mutual should have to pay the award in full.

The defendant also points out that Attorney McCullough made an inaccurate representation about a bankruptcy proceeding, and failed to follow a court order to notify the insurance company about the trial. While it is unfortunate that these things occurred, they have no bearing on the legal issues in this case. First, there has been no showing that SNRLP knew about any of these facts, or that Attorney McCullough advised his client about the judge's order. Second, evidence has been produced that Attorney Gildea, who was also in court at that time, did in fact contact Public Service Mutual immediately thereafter to notify the carrier about the trial and the fact that SNRLP was no longer being represented by counsel. It may well be that Attorney McCullough asked Mr. Gildea to make this call on his behalf, thus satisfying the order of the court.

Attorney Gildea and Attorney McCullough will both testify at trial, and will explain their actions to the jury. In the end, it will be clear that Public Service Mutual received notice of the trial and the fact that SNRLP was not being represented prior to the commencement of evidence.

It will also be established that the defendant decided not to take any action to protect SNRLP, even though it could have hired legal counsel, and asked for a continuance of the trial date if necessary. Given these circumstances, SNRLP had no obligation to defend the case at its own expense in order to protect Public Service Mutual from its obligation to pay the judgment.

The defendant's reliance on *Brown v. Employer's Reinsurance Corp.*, 206 Conn. 688 (1998) is completely misplaced. The insurance policy at issue in *Brown* required the *insured* to hire defense counsel, not the insurance company. Thus, the insured's failure to properly defend the case was found to constitute a breach of the insurance policy. In the case at bar the insurance contract clearly required Public Service Mutual to provide SNRLP with a legal defense. There was no contractual obligation for SNRLP to hire its own attorney to defend the case at its own expense. Thus, the holding in *Brown*, which is premised entirely on the terms of a different type of insurance policy, is irrelevant to this case.

(iv) Bodily Injury or Property Damage Claims

Finally, the defendant argues it is entitled to summary judgment because none of the plaintiff's claims qualify as either "bodily injury" or "property damage" under its policy. The latter claim is somewhat remarkable, given Attorney Dickins's 1998 opinion letter, which concludes that the award may in fact constitute "property damage" under the terms of the policy.

The Connecticut Appellate Court has held that claims solely for emotional distress, in the context of a pure commercial transaction, do not qualify as a form of "bodily

injury" under the typical commercial policy. *Moore v. Continental Casualty Co.*, 252 Conn. 405 (2000). The plaintiff's allegations do not stem from a commercial transaction, and the *Moore* holding may not apply. In addition, the plaintiff's complaint also alleged injuries for sleep deprivation. No case has yet ruled on whether regular sleep deprivation, and its effects on a person's ability to function, qualify as a form of "bodily injury." It should be left to the jury to decide this disputed question of fact.

With respect to the claim for "property damage" the issue is more clear cut. The plaintiff's complaint alleged a loss of the quiet enjoyment of her property whenever loud music was played at the defendants' nightclub (up to eight times over the legal limit). Black's Law Dictionary defines "quiet enjoyment" as "the possession and use of the premises in peace and without disturbance." Black's Law Dictionary, 6th Ed. (1991). Three to four nights each week the plaintiff was unable to use her home. Evidence was presented from neighbors and from investigating police officers that the noise was so loud all of the dishes clanked, and you could not hold a normal conversation or even watch television. This type of "loss of use" qualifies as a form of "property damage" under the defendant's policy. This is especially true when considering that any ambiguity must be read *in favor* of coverage, and not against coverage.

When asked to provide his professional opinion as to the insurance coverage issues in 1998, Attorney Dickins opined that the judgment returned in the underlying case could be covered as "property damage." Although a motion has been filed with the court by the defense, asking for that document to be returned, the court should still

consider the document insofar as it establishes that a legitimate argument can be made for insurance coverage. In light of all the circumstances, summary judgment would be inappropriate.

III. CONCLUSION:

For all of the reasons stated and discussed herein, the plaintiff objects to the defendant's motion for summary judgment, and asks that the motion be denied by the court. The defendant willingly refused to get involved in the underlying case in any way. The defendant gambled, assuming that the plaintiff would probably make a minimal recovery and/or would fail to pursue any judgment obtained against SNRLP. The defendant has since compounded its error by refusing to attend a global settlement mediation, or to make any serious offer to resolve this case.

The judgment at issue is now worth approximately $400,000.00, including post-judgment statutory interest. The plaintiff should be given a fair day in court, in order to prove her claims at trial. The defendant's motion should be denied.

THE PLAINTIFF

By: JOHN W. MILLS, ESQ.
Murphy and Karpie, LLC
350 Fairfield Avenue
Bridgeport, CT 06604
Federal Bar No.; ct11706
Tel: (203) 333-0177

CERTIFICATION

This is to certify that a copy of the foregoing document has been mailed, U.S. Mail, postage prepaid on July 16, 2001 to:

Oliver Dickins, Esquire
1 Phelps Lane
Simsbury, CT 06070-2215

Geoffrey Naab, Esquire
295 East center Street
Manchester, CT 06040

JOHN W. MILLS

PLAINTIFF'S EXHIBIT W

CV 94 0139352 S	: SUPERIOR COURT
ELLEN M. PECK	: J.D. OF STAMFORD/
VS	: NORWALK
RATTLESNAKE VENTURES, INC.	: AT STAMFORD

AFFIDAVIT

I, BRIAN M. GILDEA, being duly sworn, hereby depose and state:

1. I am over the age of eighteen (18) and believe in the obligations of an oath.

2. I am currently an attorney at law licensed to practice in the State of Connecticut.

* * *

4. On July 21, 1998 I was the attorney representing the defendants, William J. Opper and Rattlesnake Ventures, Inc. in civil lawsuit entitled Ellen M. Peck v. Rattlesnake Ventures, Inc., et al, CV 94 0139352 S, pending in the Stamford Superior Court.

5. I was present in court on July 21, 1998 when said case was scheduled to commence jury selection.

6. I was also present in court when the Honorable Douglas Mintz addressed the issue that one of the defendants, South Norwalk Redevelopment Limited Partnership, would not be represented by counsel because Attorney Paul McCullough requested permission not to attend the trial.

7. Following the colloquy between Judge Mintz and Attorney McCullough I contacted the Public Service

Mutual Insurance Company in Manhattan, in order to advise the claims handler that the case was scheduled to commence trial and that there would be no attorney present in order to defend its insured, South North Redevelopment Limited Partnership.

8. Although I successfully relayed this information to the Public Service Mutual Insurance Company on July 21, 1998, the claims handler simply responded by saying that Public Service Mutual had closed their file on this matter, and had no intention of hiring defense counsel or taking any other steps to get involved in the litigation.

/s/ Brian M. Gildea
Brian M. Gildea

STATE OF CONNECTICUT
SS: NEW HAVEN
COUNTY OF ~~FAIRFIELD~~ NEW HAVEN

Subscribed and sworn to before me this 7th day of February, 2001.

/s/ Christine M. Johnston
NOTARY PUBLIC/
~~COMMISSIONER OF SUPERIOR COURT~~

My Commission Expires Dec. 31, 2004

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ELLEN M. PECK Plaintiff VS PUBLIC SERVICE MUTUAL INSURANCE COMPANY Defendant	CIVIL 3:99-CV-886 (GLG) JULY 26, 2001

SUPPLEMENTAL MEMO IN OPPOSITION TO SUMMARY JUDGMENT

On May 18, 2001 the plaintiff deposed the defendant's claims manager, Daniel Jaconetti. The deposition transcript just recently arrived. Mr. Jaconetti was the person who reviewed the plaintiff's complaint when it was first sent to the defendant by the insurance agent in 1995. Attached hereto is a copy of the Claims Division Transaction Sheet filled out by Mr. Jaconetti on September 14, 1995. As indicated in item #4, Mr. Jaconetti concluded that there was in fact insurance coverage for Counts Three, Five and Seven of the Complaint. This was confirmed at Mr. Jaconetti's deposition.

Although the defendant now argues that it is entitled to summary judgment because there is no insurance coverage for any count of the complaint, because of when the complaint was originally filed, its own claims manager, the person in charge of the entire claims department, concluded otherwise in 1995. Mr. Jaconetti read the complaint, and concluded the policy covered some of the allegations. Nowhere on the intake sheet is there an indication that the complaint alleged conduct occurring wholly outside the policy period.

The intake sheet also indicates (#4) that there may be coverage for Counts Nine and Ten against SNRLP, depending on whether the landlord is an additional insured on the policy. Thus, this exhibit clearly establishes that the defendant knew that additional allegations were made against SNRLP, and knew enough to check and see if SNRLP was named as an additional insured on the policy. The defendant now claims that it had no notice of any claims made against SNRLP, and no reason to know that it insured SNRLP as an additional insured on the policy. The attached Exhibit proves those arguments to be false; points #3 and #4 establish that the defendant immediately knew that there was a co-defendant named in the complaint, and that the policy would also provide coverage for the co-defendant if the co-defendant was named as an additional insured on the policy, which it was.

The defendant's motion for summary should be denied by the court, so that Mr. Jaconetti can explain to the jury why he later refused to provide coverage, or even a legal defense to any of the defendants in the underlying case, or to advise SNRLP that coverage was being denied.

THE PLAINTIFF

By _____

JOHN W. MILLS
MURPHY and KARPIE
350 Fairfield Avenue
Bridgeport, CT 06604
Federal Bar No.: Ct11706
Tel: (203) 333-0177

CERTIFICATION

This is to certify that a copy of the foregoing has been mailed, U.S. Mail, postage prepaid on to:

Oliver Dickins, Esquire
One Phelps Lane
Simsbury, CT 06070

Geoffrey Naab, Esquire
295 East Center Street
Manchester, CT 06040

JOHN W. MILLS

ENTREX = (CHANGE)

CLAIMS DIVISION TRANSACTION SHEET

FILE #: 11-441550 REQUESTED BY: DA DATE: 9/14/95

POLICY NUMBER: 74-319169 ACCIDENT DATE: 12/1/94

☑ SET-UP

ACCIDENT STATE CODE 06

CAT CODE

SUFFIX	EXAMINER'S CODE	SPECIFY TYPE OF COVERAGE	CLAIMANT	RESERVE
01	L016	BI	Fleischeck 9/15	#99

STAMFORD

DESCRIPTION OF LOSS:

DIARY INSTRUCTIONS:

☐ RESERVE CHANGE SUFFIX ____ TO (NEW) $ ____ AUTH. BY: ____

SUFFIX ____ TO (NEW) $ ____ AUTH. BY: ____

②

LINE	KD	TR	SUB CODE	CO	POLICY NO.	CLAIM NUMBER	SUF	RESERVES	FACULATIVE SUF	FACULATIVE CO	REINSURANCE AMOUNT

☐ CLOSE CLAIM SUFFIX ____ SUFFIX ____ FACULATIVE REINSURANCE

③

LINE	KD	TR	CO	POLICY NO.	CLAIM NUMBER	SUF	SUF	CO	SUF	CO	SUF	CO

☐ ISSUE CHECK ☐ PAYMENT ☐ EXPENSE PROVIDER NO.: ____ AUTH. BY: (KOSH)

ADDITIONAL INSTRUCTIONS:

$ ____ SUFFIX ____ TO: (PAYEE) ____

FOR LOSS ONLY – CHECK BOX BELOW:

PARTIAL PAY ☐ TR. 52

FINAL PAY ☐ TR. 50

ADD FINAL PAY ☐ TR. 51

BLECHER: LOOKS LIKE WE ARE THE LAST CARRIER IN LINE –

① HAS Anyone Answered For Insd. & Principal Yet? 5/2/97 6/94

② " " " " Co-Δ Yet?

③ " Co-Δ Sought Def. & Indem. From Insd.? (NO)

④ Counts 3,5+7 are Cov'd. (NOTE: missing pg. 8 of EC.

Counts 9+10 Possibl. Depending upon Lease Agree.

AND IF Co-Δ is Add'l. Insd. on Policy

⑤ Punitive No Cov'd. –

OK ⑥ GET H.C. OF Polic. & LEASE ASAP

⑦ Ltr. Disc. Coverage Position with All Above Rec'd. & Known –

$ ____ SUFFIX ____ TO: (PAYEE) ____

FOR LOSS ONLY – CHECK BOX BELOW:

PARTIAL PAY ☐ TR. 52

FINAL PAY ☐ TR. 50

ADD FINAL PAY ☐ TR. 51

☐ REOPENING

SUFFIX	EXAMINER'S CODE	RESERVES

SUFFIX ____

SUFFIX ____

☐ PROCESS REIMBURSEMENT ____ SUFFIX ____ REASON ____

☐ STOP PAYMENT; ☐ VOID

TO BE APPLIED TO: ☐ PAYMENT; ☐ EXPENSE

$ ____ SUFFIX: ____ CHECK #: ____

CHECK TO BE REISSUED: ☐ YES; ☐ NO; ☐ UNDETERMINED AT THIS TIME

☐ SPECIAL "K" (REQUIRED FOR PAYMENT, IF FILE IS CLOSED 18 MONTHS OR MORE)

Left Msg. for Ms. Bloss AD 9/18/95 9/18/95

RL 9-15-95

COMPLETED BY DATE VERIFIED BY DATE

3398 C 9/93

☐ DATA ENTRY/STAT ☐ FILE COPY ☐ CLAIMS CONTROL

PLAINTIFF'S EXHIBIT H Id 5-18-01

App. 22

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

ELLEN M. PECK	*	
PLAINTIFF,	*	
VS	*	
GREATER NEW YORK MUTUAL INSURANCE COMPANY, PUBLIC SERVICE MUTUAL INSURANCE COMPANY	*	Civil Action No. 3:99-CV-886 (GLG)
DEFENDANTS.	*	

DEPOSITION OF DANIEL JACONETTI, taken pursuant to the Federal Rules of Civil Procedure, at the law offices of MURPHY AND KARPIE, LLC., 350 Fairfield Avenue, Bridgeport, Connecticut, before Carol J. Beecher, a Registered Professional Reporter and Notary Public in and for the State of Connecticut on FRIDAY, MAY 18, 2001 at 11:30 A.M.

BEECHER & HORVATH
73 MILLBROOK ROAD
NORTH HAVEN, CT. 06473
(203) 230-0010
FAX (203) 281-3429

* * *

[49] particular case for some years now and having brought with you today your claims file, can you tell me one way or the other as to whether you ever received a

copy of the summons and complaint in the underlying action?

A I'm sure we've received it at some point.

Q Can you tell me when?

A Specifically, no.

Q Is it fair to say that, anyway as of September 14th, 1995 that you opened a file on this case?

A I opened the file and based on what I wrote here I had to be looking at a summons and complaint.

Q May I see that, please.

A (Witness handed document to counsel.)

Q Do you fill out a Claims Division Transaction Sheet for every claim that comes in?

A For every set up of claim, yes.

Q It says here, "Accident state code 06." I that Connecticut?

A Yes.

Q "Examiner's code LO 16." Is that you?

A No. That's an internal code. That's [50] Mr. Blecher's code.

Q And specify the type of coverage. BI is bodily injury?

A Correct.

Q The claimant is Ellen Peck?

A Yes.

Q The reserve is 99?

A $99 is a code reserve. It's a reserve that is put on every claim that's set up where we don't know whether or not we have coverage, when we don't know the value of the claim.

Q Is it fair to say at some point from September 14, 1995 until today, the reserve was raised from $99 to $50,000?

A Yes.

Q This is at the bottom, there's initials, completed by. Is that your initial there?

A No, it is not.

Q Who is that?

A That may be Pat Lilly, PL. She used to be one of the clerical support staff.

Q And dated 9/15/95. Why would that –

A That would be for the file. Basically, let me explain. I fill out this sheet, it's green [51] in color. I fill out this sheet and I attach to the sheet the first report notice. I hand it into the clerical support staff. They, in turn, just hand it back to me with a file number and a blank file jacket, and that's probably what that is about.

Q Now, underneath that under the additional instructions there's a notation that says Blecher. Is that Barry Blecher?

A Yes.

Q "It looks like we are the last carrier in line." You see that?

A Yes.

Q Also an indication, "rush" is written up there. What is that?

A That's my writing "rush" to Mr. Blecher, that he has to take care of this immediately.

All of this right here, not the okay, but all of this which you can see, that's all my handwriting. This is my initials right here.

Q You have listed several items, you have circles 1, 2, 3, all the way through 7. There's a line you have something written through?

A That's correct.

[52] Q Would you agree that you filled this out September 14, 1995?

A Yes.

Q At that time didn't you put as number 4 that counts 3, 5 and 7 of the complaint were covered?

A That's what I wrote.

Q Now, once you filled out Exhibit H and a file jacket was created and you wrote this note to Mr. Blecher, did the file then go to Mr. Blecher for future handling?

A Yes.

Q And from that point forward did you have any day-to-day involvement with the file that you can recall?

A If and when Mr. Blecher brought it to me for further discussion.

Q Let me show you what's been marked as Plaintiff's Exhibit J. This is a letter to Barry Blecher from Gene Cedarbaum at Goldstein and Peck. It says he's giving PSM a copy of the revised complaint dated August 29, 1994 and an amended answer and special defense.

MR. DICKINS: You want him to review

* * *

PLAINTIFF'S EXHIBIT
I

®

United Insurance Agencies, Inc.

Phone: 203-339-6300 • Fax: 203-339-6322
2890 Main Street, P.O. Box 289 •
Stratford, CT 06497-0289

FAX

FROM

RONALD FITELSON

DIRECT PHONE # (203) 339-6327

DATE:	9/12/95
TO:	Liability Claims Dept.
COMPANY:	PSM
RE:	Rattlesnake Bar & Grill
TO FAX #:	1-212-268-9675
# OF PAGES:	20

Please Find Enclosed Loss Notice & Summons.

Please Contact Insured's Atty

Gene Cederbaum ASAP 203-226-7488

Fax 203-226-6403

Any Questions Please Call.

/s/ Ronald Fitelson

United Insurance Agencies, Inc.,
Main Street, P.O. Box 289, Stratford, CT 06497-0289

TEL: (203) 339-6300 FAX: (203) 377-8414

Rattlesnake Bar & Grill	11-441550 Please refer to this # on all inquiries

CLAIMANT	LOSS LOCATION	LOSS DATE 12-1-94
Ellen Peck	Norwalk, Ct	DATE REPORTED 9-14-95
EXAMINER	PHONE #	POLICY #
B Blecher	(212) 560-5022	4-319169

CLAIM TYPE:

AUTOMOBILE/CYCLE ☐ LIABILITY ☒

WE HAVE RECEIVED A REPORT OF THE ABOVE LOSS WHICH WILL RECEIVE OUR PROMPT ATTENTION

PSM INSURANCE COMPANIES
PUBLIC SERVICE MUTUAL INSURANCE COMPANY
PARAMOUNT INSURANCE COMPANY
132 WEST 31ST STREET
NEW YORK, NY 10001-3406

TOLL FREE #
1-800-223-5213

9059 12/90 ACKNOWLEDGEMENT COPY

[Names Omitted In Printing]

September 8, 1995

Mr. Ron Fitelson
Max Fitelson & Son, Inc.
2546 Main Street
Bridgeport CT 06606

Re: Ellen Peck v. Rattlesnake Ventures Inc., et al.

Dear Mr. Fitelson:

This letter will confirm my understanding reached yesterday when we spoke that you will formally put Public

Service Mutual Insurance company on notice of the above law suit. For your information, I am enclosing a copy of the Revised Complaint dated August 29, 1994 and the defendants' Answer dated October 5, 1994.

Please be advised that Thomas Stevens, Esquire, of Gildea & Stevens, L.L.C., has appeared for the defendants under the insurance policy with Greater New York. Although Aetna had originally contested coverage, they are reconsidering their position. Goldstein and Peck P.C. has also filed an appearance on behalf of the defendants. You may advise PSM to contact me, should they desire, at our Westport Office, 190 Main Street, 203-226-7488.

Kindly send me a copy of your letter to PSM. Should you have any questions, please feel free to contact me.

Yours truly,

/s/ Eugene E. Cederbaum
Eugene E. Cederbaum

EEC: cav
Encls.
cc: Mr. David Sederholt
Mr. William Opper
G. Kenneth Bernhard, Esq.